United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

To be argued by: Christopher Crowley

77-7145

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 77-7145

THE GUARDIANS ASSOCIATION, et al.,

Plaintiffs-Appellees,

-against-

CIVIL SERVICE COMMISSION OF THE CITY OF NEW YORK, et al.,

Defendants-Appellants.

On Appeal From an Order of the
United States District Court
for the Southern District of New York

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BRIEF OF PLAINTIFFS-APPELLEES

PRELIMINARY STATEMENT

This is an appeal by defendants Civil Service Commission of the City of New York, Department of Personnel of the City of New York and New York City Police Department, et al. from a preliminary injunction of the District Court for the Southern District of New York (Carter, J.), entered March 30, 1977 pursuant to an opinion entered March 17, 1977.

QUESTIONS PRESENTED

1. Whether the layoffs which occurred after the effective date of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000 et seq. ("Title VII"), and the seniority system on which those layoffs are based perpetuate past discriminatory hiring practices in violation of Title VII?

2. Whether the findings of the District Court (1) that plaintiffs had presented a prima facie case of discrimination by showing the adverse statistical impact of defendants' employment practices and (2) that defendants had not met their burden of showing job-relatedness were clearly erroneous?

3. Whether the relief granted by the District Court, which assigns constructive appointment dates to members of the plaintiff class who, because of past discrimination, have less seniority than others, is an abuse of discretion?

INTRODUCTION

This appeal raises issues virtually identical to those decided by this Court in two recent cases, Acha v. Beame, 531 F.2d 648 (2d Cir. 1976), and Chance v. Board of Examiners, 75 Civ. 7161, and 75 Civ. 7165 (January 19, 1976), modifying 534 F.2d 993 (2d Cir. 1976): whether civil service employees who, because of past discrimination, were hired later than they would have been under a non-discriminatory system and as a result have lower seniority than they would otherwise have may be granted constructive seniority which places them in the position they would have had but for the discriminatory employment practices.

Although almost 40% of the population of New York City is made up of blacks and Hispanics ("Minorities"), only 10% of the members of the New York City Police Department ("NYCPD") are Minorities. The principal explanation for this disproportion is that written entry level examinations discriminate against Minorities. As was demonstrated below and in a prior litigation, pass rates for Minorities on entry-level examinations are substantially lower than pass rates for whites. Minorities who do pass the entry level examinations tend to receive much lower scores than whites. Since the examinations are "competitive",

i.e., candidates are appointed in the order of their examination scores -- those with highest scores are appointed first, those with lowest scores are appointed last, Minorities are appointed to the force much later than whites and therefore have much lower seniority. The ultimate question on this appeal is whether defendants can continue to use the results of these sharply discriminatory entry level examinations -- which were given in 1968-1970, before Title VII was amended to include municipal employees -- as the fundamental basis for determining hirings, layoffs and recalls after the amendment.

The link between the biased examinations and the discriminatory layoffs is direct and clear: while Minorities constituted 11.4% of the NYCPD at the time of the layoffs in June 1975, almost twice as many, or 20% of those actually laid off were Minorities. The layoffs caused the Minority representation in the NYCPD, already modest when compared with that in other major cities, to fall off measurably.

Defendants' practices constitute continuing acts of discrimination as long as the discriminatory tests are used to decide who will be hired, laid off or recalled. Although the tests were given prior to the amendment, most of the members of the class were actually appointed after

the amendment. The constructive appointment date for most members of the class, i.e., the median date on which they would have been appointed but for the discriminatory nature of the tests, was after the amendment. The actual layoffs occurred in June 1975, after the effective date of the amendment, as are the decisions regarding rehiring. In these circumstances, the court below was clearly correct in holding that defendants had engaged in continuing violations of Title VII and in granting relief accordingly. Appellees urge that the Court rule here, as did the courts in Acha v. Beame, 75 Civ. 3128 (July 16, 1976, S.D.N.Y.), and Evans v. United Airlines, Inc., 534 F.2d 1247 (7th Cir. 1976), cert. granted, 45 U.S.L.W. 3329 (1976), that the seniority systems were discriminatory activities of a continuing nature and an integral part of defendants' discriminatory hiring practices.

STATEMENT OF THE CASE

A. Procedural Background

1. The Guardians Association, et al. v. Civil Service Commission, et al. ("Guardians I")

In March 1972 a lawsuit entitled The Guardians Association v. Civil Service Commission, 72 Civ. 928 (S.J.R.) ("Guardians I") was filed challenging, inter alia, the entry level examinations at issue herein. The height requirement was not raised in Guardians I. In March 1973 plaintiffs moved for a preliminary injunction against appointments from the eligibility lists based on the discriminatory examinations. Earlier that year, it had been agreed upon by the parties that the City would hire an impartial third party, the New York City Rand Institute ("Rand"), to conduct a survey of the racial impact, if any, of the challenged entry level examinations. The Rand study findings supported plaintiffs' contention that the entry examinations had had a racially disproportionate impact. See "Police Civil Service Selection Procedures in New York City: Comparison of Ethnic Groups" ("Rand Report") (SA85sa).* At that time, plaintiffs also submitted affidavits and other information showing that the past examinations

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* Numbers preceded by the letters "SA" refer to the Supplemental Appendix submitted by plaintiffs-appellees.

were not job-related.

On July 12, 1973 the District Court (Ryan, J.) denied the motion for a preliminary injunction. (SA1sa) This Court affirmed on the ground that the existing lists based on the challenged examinations were soon to be exhausted. Guardians Association v. Civil Service Commission, 490 F.2d 400, 404 (2d Cir. 1973). (SA2sa) Because the basic hiring issue had become moot, plaintiffs did not pursue the action further at that time. The June 1975 layoffs, however, raised new issues which the courts and the parties did not address in Guardians I.

2. The Present Action

This action was filed on April 30, 1976.* On May 3, 1976 plaintiffs filed an order to show cause seeking a temporary restraining order and a preliminary injunction enjoining further layoffs or recalls in the NYCPD predicated on the challenged employment practices. (A25a)**

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* On March 24, 1976 plaintiffs attempted to move before Judge Ryan for expedited discovery to determine the impact of the layoffs on Minority police officers. See Order to Show Cause and Motion for Expedited Discovery (SA12sa). Judge Ryan indicated, in a letter to plaintiffs' counsel, that he regarded the case as closed. (SA83sa) Although plaintiffs took the position that the action was not closed, they decided, in light of the irreparable injury to plaintiffs and the urgent need for relief, that it was necessary to proceed with a new action. See letter of April 8, 1976 from Christopher Crowley, Esq. to Judge Ryan (SA84sa)

** Numbers preceded by the letter "A" refer to the Appendix submitted by defendants-appellants.

Plaintiffs' application for a temporary restraining order was denied on that date.

Hearings on the preliminary injunction commenced on May 12, 1976 and continued until July 29, 1976. In early July plaintiffs renewed their application for a temporary restraining order to bar the impending rehire of sixty police officers. Plaintiffs' application was denied based on an affidavit of Police Commissioner Michael J. Codd, which stated that all recalled police officers would be required to sign acknowledgments that their rights to employment were subject to the outcome of the pending litigation. (A411a) See Opinion of District Court, March 17, 1977 ("Op.") (A330a, A331a-A332a).

On March 17, 1977, the District Court issued an opinion finding that the layoffs violated Title VII because they perpetuated defendants' past discriminatory hiring practices -- that is, hiring based on entry level examinations and a height requirement which had been shown to have a discriminatory impact on Minorities and which were not shown to be job-related. (A330a, A342a) The Court granted a preliminary injunction restraining the NYCPD from firing or recalling any police officers until its seniority lists were reordered to accord plaintiffs the seniority they would have had but for defendants' discriminatory practices. The

Court also certified the plaintiff class as those black and Hispanic police officers who were subject to layoff in June 1975. (A330a)

B. The District Court Order

Immediately after the opinion was filed, the District Court called the parties together to discuss the order to be entered. All of the parties and the Court were aware at this time that the NYCPD had scheduled substantial rehirings for March 31 and April 1, 1977. The District Court was concerned that, if possible, relief in this action should be part of the scheduled hirings, but that such relief proceed with as little disruption as possible and in a manner consistent with the relief ordered by Judge Duffy in Acha v. Beame, supra. (SA295sa, SA307sa) Accordingly, the parties were directed to submit proposed orders to the Court. (SA295sa, SA318sa)

During the next eleven days the Court held three hearings on relief. (SA295sa, SA322sa, SA353sa) Despite repeated requests by the Court, defendants refused to submit a proposed order for constructing relief. Their position was that no relief whatsoever should be accorded until all appeals in this case had been determined. (SA314sa-SA316sa, SA324sa, SA344sa-SA345sa, SA406sa, SA408sa, SA431sa-SA432sa, SA467sa, SA469sa, SA551sa) During this period, plaintiffs

submitted three proposed orders to the Court (March 18, 21 and 28). (SA555sa, SA560sa, SA566sa) Plaintiffs presented their theory of relief, methodology and lists of members of the plaintiff class who, according to plaintiffs' proposal, should be immediately rehired. (SA361sa-SA376sa; Steinbock Aff., A392a)

On March 28, 1977 the District Court held an evidentiary hearing on the impact of the proposed relief. At the end of that hearing the Court signed plaintiffs' proposed order directing that specified members of plaintiff class be rehired* and, in the event that defendants failed to rehire these police officers, enjoining the NYCPD from recalling any police officers until the seniority lists were reordered to give plaintiff class members the seniority they would have had but for defendants' discriminatory practices. (A417a) Defendants' motion to stay the Court's order was denied. (Tr. SA553sa)

C. Appeal from the District Court Order

On March 30, 1977 defendants-appellants filed a

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* The members of the class ordered rehired immediately were those whose constructive seniority dates preceded those of the police officers scheduled for rehiring on March 31 and April 1. See Steinbock affidavit ¶¶ 7-11 and Exhibit B thereto (A392a, A401a) The order was later modified to allow the members of the Acha class ordered rehired by Judge Duffy to return to work. (A417a)

notice of appeal from the District Court order and moved by order to show cause for a stay of the District Court's order of March 28, 1977. (A422a) Plaintiffs-appellees submitted papers in opposition. (SA573sa) Argument was heard before this Court (Lumbard, J.; Mansfield, J.; Gurfein, J.) on March 31, 1977. This Court stayed the District Court order pending determination of the appeal, subject to the conditions that: (1) the NYCPD notify police officers who will be hired before the appeal is decided that their rights are subject to the outcome of this litigation; (2) defendants be put on notice that back pay may be granted for plaintiffs rehired from the date of the district court's opinion to the date of rehiring; (3) the appeal be expedited; and (4) defendants proceed expeditiously to process the information necessary to certify members of the plaintiff class for immediate rehire and cooperate with plaintiffs' counsel in constructing relief and report to the Court in writing the progress of this cooperation. (SA578sa)

STATEMENT OF FACTS

A. Disparate Adverse Impact of Defendants' Seniority Layoff System

On June 30, 1975 approximately 3,343 police officers in the NYCPD were laid off due to budget cuts. These layoffs have had a significant disparate adverse impact on the Minority police officers in the NYCPD.

Layoffs and recalls in the NYCPD are made in accordance with Sections 80 and 81 of the New York Civil Service Law. Section 80 provides that "suspension or demotion, as the case may be, among incumbents holding the same or similar positions shall be made in the inverse order of original appointments on a permanent basis . . . ." Section 81(2) provides for "reinstatement to a vacancy in an appropriate position in order of original appointments." Police officers are appointed to the NYCPD in order based primarily on their entry level examination score. Applicants who score highest on the examination are ranked first and therefore appointed first; those who score lowest are appointed last. Layoffs are made in strict inverse order based on this ranking.

Minority police officers have been laid off at a rate over twice the layoff rate for whites. In the major layoff of June 30, 1975, 2,664, or 9.8%, of the white officers were laid off, whereas 455, or 18%, of the blacks, and 224,

or 22%, of the Hispanics were laid off. Pl. Exhs. 12, 13. The chart* which follows illustrates the disparate impact of the layoffs on Minority police officers.

	Number (%) Before June 1975 Layoffs	Number (%) Laid Off as of August 1975	Number (%) After June 1975 Layoffs	Percentage Laid Off
White	27,220 (88.6%)	2,664 (9.8%)	24,556 (89.6%)	9.8%
Black	2,488 (8.1%)	455 (18%)	2,033 (7.4%)	18%
Hispanic	1,014 (3.3%)	224 (22%)	790 (2.9%)	22%
	30,722	3,343	27,379	

The layoffs thus increased the percentage of white police officers and sharply decreased the percentage of Minorities in the NYCPD.

B. Disparate Adverse Impact of Defendants' Entry Level Examinations

The examinations at issue in this lawsuit are the NYCPD entry examinations administered up to and including the 1970 examination.** These examinations have been shown to have a discriminatory impact on Minorities in a comprehensive report issued by the Rand Institute as well as by defendants' own reports and figures.

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* Sources: Pl. Exhs. 12, 13; NYCPD figures as of April 3, 1975, August 28, 1975.

** Plaintiffs do not, however, in any way concede that entry level examinations administered subsequent to 1970 were not discriminatory.

1. The Rand Report

In 1972, the Rand Institute of New York was authorized, in connection with Guardians I, to conduct an independent study of the NYCPD entry level examinations in order to determine if such examinations had a discriminatory impact on Minorities. The study was authorized by all parties to the lawsuit and was paid for by the City of New York and Fund for the City of New York. It was conducted with the full cooperation of all parties. All sides were consulted as to the methodology of the study and were kept apprised of interim findings. (Rand Report, SA85sa, SA88sa; Pl. Exh. 14 (letter from Corporation Counsel to Rand); Pl. Exh. 15 and 16 (Rand proposals); Tr. Cohen (A1, A3, A12, A24, A25, A30-A32)

To determine whether the NYCPD examinations had a discriminatory impact on Minorities, Rand studied two examinations -- Examination No. 8046 (July 20, 1968), the earliest examination with an eligibility list then still in use, and Examination No. 0013 (May 9, 1970), the last examination with a list then in use. (Rand Report, SA88sa; Tr. Cohen, A11) Both parties knew that only two examinations were to be studied, although the pending lawsuit challenged all NYCPD entry examinations. (Tr. Cohen, A11)

In order to assess whether the examinations had a

statistically discriminatory impact, Rand first had to determine the race and ethnicity of those who took the examinations. Race and ethnicity of those who took the examinations were identified in five ways: (a) data was supplied by the NYCPD for all those persons who filed forms for the investigation process; (b) a questionnaire which inquired into race and ethnicity was mailed to all persons who took the examinations; (c) a Hispanic surname identification based on a United States Census Bureau of Hispanic names was used; (d) race and ethnicity were identified by data from census tracts in New York City based on residence; and (e) those who took the examinations were questioned regarding their race and ethnicity in a telephone survey. (Rand Report, SA113sa-121sa; Tr. Cohen, A7, A9, A80-A85, A94, A97, A99, A102, A108)

The Rand Report then analyzed the passing rates for whites, blacks and Hispanics on the two examinations. It divided the examinees by deciles based on their raw scores on the examination (i.e., 10% breakdowns of examinees, from the 10% with the highest scores to the 10% with the lowest scores). Racial data analyzed by decile are important because they graphically demonstrate the pervasiveness of the discriminatory results. They are particularly telling for the instant action because police

officers are appointed and laid off in the order of their test scores -- those with the highest scores are appointed first and laid off last, and those with the lowest scores are appointed last and laid off first. (Rand Report, SA134sa, SA141sa, SA142sa)

Regardless of the method chosen to determine race and ethnicity, the Report found that whites passed consistently at higher rates than Minorities. Whites comprised the overwhelming majority of persons in the top decile, and Minorities the overwhelming majority in the last decile. On Examination No. 8046, whites passed at a rate 1.6 times that of Minorities. Conversely, Minorities failed at a rate 1.4 times that of whites. Correspondingly, the Rand Report found that whites had higher scores on the average than Minorities. (Rand Report, SA143sa)

The results for entry level Examination No. 0013 given on May 9, 1970 were very much the same as those for Examination No. 8046. On Examination No. 0013, whites passed at 1.84 times the rate of Minorities. Conversely, Minorities failed at 3.5 times the rate of whites. The scores by deciles for Examination No. 0013 are also strikingly similar to performance by decile for Examination No. 8046. (Rand Report, SA128sa) Tables from the Rand Report which make clear the disproportionate racial impact of the

examinations at issue are reproduced in the Appendix to the District Court opinion. (A330a, A377a-386a)

The results of the Rand study clearly show the sharply discriminatory impact of the examinations. The Rand Report concluded:

> "To summarize, we have found substantial and statistically significant differences by race in the distributions of exam scores for whites as compared to blacks and Hispanics for both exam #8046 and exam #0013. Blacks and Hispanics scored lower than whites and failed at higher rates. . . . These findings were confirmed by three different methods of data analysis." (SA144sa.)

Because of the similarity of the results on the two examinations, which were given two years apart, the Rand experts determined that it was highly improbable that the discriminatory impact was confined to the examinations studied.

> "Therefore, we are confident that the patterns observed for exam #0013 are not unique to that exam but are most likely typical of the patterns for all recent civil service patrolmen's exams." Rand Report, SA136sa; See Tr. Cohen, A10, A11.

This conclusion is borne out by statistical data and studies of other entry level examinations conducted by the Department of Personnel.

2. Department of Personnel Studies

The Department of Personnel conducted its own studies on other entry level examinations to determine

whether the NYCPD entry level examinations had an adverse statistical impact by race. The results of these studies were completely consistent with the Rand Report.

The Department of Personnel presented racial data for entry level Examination #7046, given on November 4, 1967. (Pl. Exh. 17)* The results clearly demonstrated the discriminatory impact of the examination. White candidates achieved the highest mean scores on the total test and for each of the subtests. Whites had a mean score of 70.5, whereas blacks had a mean score of 57.5 and Hispanics had a mean score of 49.1. (Pl. Exh. 17, pp. 5-6) As the writer of the draft report noted:

> "As it turned out, this ethnic factor (that is, whether the applicant was White, Negro or Puerto Rican) emerged as the only background factor that had a marked and consistent association with test performance." Pl. Exh. 17, p. 5.

The Department of Personnel also conducted a study of entry level examinations Nos. 9080 and 9081 (for patrolmen and policewomen, respectively) which was held on October 25, 1969. Pl. Exhs. 18, 19. The study found that whites passed the examinations at a substantially higher rate than blacks.

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* Although this was termed an interim report, no further report on this examination was ever submitted. Moreover, the report itself indicates that a further report would accept the statistical finding of the interim report and would only attempt to explain the reason for the statistical disparity. (Pl. Exh. 17, p. 7)

Of those sampled, 76.3% of the whites passed, 47.9% of the blacks passed and 39.2% of the Puerto Ricans passed. Pl. Exh. 19, p. 2. That is, whites passed the examination at a rate 1.6 times that of blacks and 1.9 times that of Puerto Ricans. The mean score for whites sampled was 78.54; the mean score for blacks sampled was 69.75; and the mean score for Puerto Ricans sampled was 66.66. Pl. Exh. 19, p. 1.

C. Disparate Adverse Impact of Defendants' Height Requirement

Until 1973, defendants maintained a 5'7" height requirement for positions of NYCPD patrolmen. Prior to 1969 the height requirement was 5'8" and earlier it had been 5'9". The maintenance of the height requirement has had a disproportionate impact on Hispanics.

The mean height for Hispanic males in the metropolitan area is 66.8 inches, or slightly less than 5'7".* Thus, over 50% of all Hispanic males were prohibited from entering the NYCPD by the maintenance of the 5'7" height requirement. The impact of the earlier height requirements of 5'8" and 5'9" was even greater -- 75.2% of all Hispanics

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* "Height of American Male Youths of Military Age by Race, Ethnic Group and Selected Geographic Areas, Fiscal Year 1972", report prepared for the Office of the Assistant Secretary of Defense, Table 3 ("Height Report"), attached as Exhibit Q to Crowley Affidavit in Support of Plaintiff's Motion for Preliminary Injunction. (SA259sa)

are 5'8" or less and 84.5% are 5'9" or less. (Height Report, SA266sa) The mean height for non-Hispanic whites is 69.4 inches and the mean height for blacks is 69.1 inches. (Height Report, SA264sa)

A height requirement of 5'7" eliminates from employment only 19.1% of non-Hispanic whites and 22.1% of blacks, whereas 54.5% of Hispanic males are excluded. (Height Report, SA261sa) As a result of defendants' 5'7" height requirement, approximately 2.5 times as many Hispanics were not considered for positions as NYCPD patrolmen as non-Hispanics.

D. Defendants' Failure to Follow Established Procedures for Test Preparation and Validation

There are generally recognized standards established by the Equal Employment Opportunity Commission ("EEOC") and the American Psychological Association for test preparation and validation. These standards have been recognized by the courts and experts in the field as minimum requirements for the creation and administration of acceptable examinations. Pl. Exh. 2 (Equal Opportunity Commission Testing and Selecting Employees Guidelines) ("EEOC Guidelines"); Pl. Exh. 3 (Standards for Educational and Psychological Tests). The documentary evidence and testimony presented at the hearings clearly demonstrate that defendants took no steps to prepare or properly validate the examinations at issue.

ARGUMENT

SUMMARY

The issue of whether the acts complained of in this action violate Title VII arises primarily because of the chronology of events in this case. The examinations in question were given in the years 1968 to 1970. Ranked lists of persons eligible for appointment based on the scores on the examinations were created at that time. The hiring from these lists spanned the years 1968 to 1974, with a hiatus from February 1970 to January 1973 due to a hiring freeze. Title VII became applicable to defendants' employment practices by amendment effective March 24, 1972. The layoffs from the police department took place in June 1975. EEOC charges were filed by plaintiffs at that time.

This chronology of events creates the following issues on appeal:

1. Whether layoffs based on seniority dates premised on discriminatory examinations violated Title VII because they were founded on and perpetuated the effects of earlier discriminatory hiring practices?

2. Whether EEOC charges filed at the time of the layoffs are timely to challenge a seniority system which continues the effects of prior hiring practices?

The District Court properly held, in accordance with this Court's holdings in United States v. Bethlehem Steel Co., 446 F.2d 652 (2d Cir. 1971), and Acha v. Beame, supra, that the layoffs violate Title VII because they perpetuate defendants' discriminatory hiring practices, namely, examinations and a height requirement which had a disparate adverse impact on Minority applicants and which were not shown to be job-related.

The EEOC charges were timely filed because the acts complained of were the layoffs, premised on seniority determined by discriminatory selection procedures which constitute a continuing violation of Title VII under this Court's holding in Acha v. Beame, supra, 531 F.2d at 655.

The District Court found that plaintiffs established a prima facie case of discrimination by showing the adverse impact of defendants' hiring practices, which resulted in members of plaintiffs' class having less seniority -- and being laid off sooner -- than they would have had they passed or scored higher on the entry level examinations or not been required to meet the height requirement. (Op., A346a-A351a, A365a-A367a) The Court found that defendants had not met their burden of demonstrating the job-relatedness of the examinations and height requirement. (Op., A351a-A365a, A367a) The District

Court's findings are based on comprehensive, voluminous testimony and documentary evidence. These findings are not clearly erroneous and therefore must be upheld.

There can be no question as to the propriety of the relief ordered by the District Court. Orders barring the continued implementation of seniority provisions to eradicate the continuing effects of past discriminatory practices and granting seniority relief to Minority employees to place them in the position in which they would have been but for the employer's unlawful practices have become standard forms of relief approved by this Court in both public and private employment discrimination cases. Indeed, such relief is required, barring unusual circumstances not present here, by the Supreme Court's holding in Franks v. Bowman Transportation Co., 424 U.S. 747 (1976) ("Franks"); and by this Court's rulings in United States v. Bethlehem Steel Corp., supra; Chance v. Board of Examiners, supra; and Acha v. Beame, supra. Defendants, who refused to put forward a constructive proposal for relief, cannot now claim that the relief ordered by the District Court was an abuse of discretion.

The alternative clause of the District Court's order enjoining defendants from layoff of recalling any police officers until plaintiffs are accorded the seniority

they would have had but for defendants' discriminatory practices is also proper. Where, as here, the District Court conducted hearings, balanced the hardships on both sides, and determined that plaintiffs would be irreparably injured by the continued discriminatory practices of defendants, issuance of an injunction was not an abuse of discretion. Fed.R.Civ.P. 65(a).

POINT I

THE LAYOFFS AND THE SENIORITY SYSTEM ON WHICH THEY WERE BASED VIOLATE TITLE VII

A. The Layoffs and the Seniority System on Which They Were Based Violate Title VII in That They Continue the Discriminatory Effect of Prior Hiring Practices

It is a fundamental principle of Title VII law that practices which are "neutral on their face, and even neutral in terms of intent, cannot be maintained if they operate to 'freeze' the status quo of prior discriminatory employment practices." Griggs v. Duke Power Co., 401 U.S. 424, 430 (1971). In Franks, the Court held that constructive seniority is ordinarily required as part of the Title VII remedy for discrimination in hiring. In this and every other Court of Appeals which has resolved the matter, the courts have found that facially neutral seniority practices which "freeze the status quo," preventing the victims of past discrimination from attaining their rightful place in the employment hierarchy, are themselves unlawful under Title VII.*

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* See Acha v. Beame, supra; United States v. Bethlehem Steel Corp., supra; Robinson v. Lorillard Corp., 444 F.2d 791 (4th Cir.), cert. denied, 404 U.S. 1006 (1971); Swint v. Pullman-Standard, 539 F.2d 77 (5th Cir. 1976); United States v. Papermakers Local 189, 416 F.2d 980 (5th Cir.

The Supreme Court in Franks found that Title VII "requires that persons aggrieved by the consequences and effects of the unlawful employment practice be, so far as possible, restored to a position where they would have been were it not for the unlawful discrimination." 424 U.S. at 764. The Court also recognized in Franks that, due to the ongoing nature and effect of seniority practices, the reform of those practices "cuts to the very heart of Title VII's primary objective of eradicating present and future discrimination . . ." Id. at 768 n.28.

Thus, the Griggs and Franks decisions, as well as those of this Court in United States v. Bethlehem Steel Corp., supra and Acha v. Beame, supra, clearly indicate that a continuing seniority policy which perpetuates the effects of past discrimination against present employees is itself a violation of Title VII. Defendants do not dispute that fundamental point. Rather, they argue that the layoffs here do not fall within that established rule because the discriminatory examinations, even though relied upon for layoffs and proposed rehirings after 1972, were given before

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1969), cert. denied, 397 U.S. 919 (1970); EEOC v. Detroit Edison Co., 515 F.2d 301 (6th Cir.), cert. filed, 44 U.S.L.W. 3214 (U.S. Oct. 7, 1975); Rogers v. International Paper Co., 510 F.2d 1340 (8th Cir.), as modified, 526 F.2d 722 (1975); United States v. Ironworkers Local 86, 443 F.2d 544 (9th Cir. 1970), cert. denied, 404 U.S. 984 (1971); Jones v. Lee Way Motor Freight, 431 F.2d 245 (10th Cir. 1970), cert. denied, 401 U.S. 954 (1971).

Equal Employment Opportunity Act of 1972 made Title VII applicable to municipal employees. Appellants' argument lacks merit as a matter of law and as a matter of fact.

1. Franks Did Not Change the Law of this Circuit as set forth in U.S. v. Bethlehem Steel Corp. and Acha v. Beame. That Law Requires the Modification of Seniority Practices Which Perpetuate Earlier Discrimination in Hiring or Job Assignment, Even Where that Discrimination Was Founded on Conduct that Took Place Prior to the Time that Title VII was Applicable to the Employer

Defendants incorrectly argue that the Supreme Court in Franks held that only persons discriminatorily denied employment after the effective date of Title VII are entitled to seniority relief. (Appellants' Brief at 29). This question was not, however, resolved in Franks. Indeed, the Court there explicitly confined itself to resolving the question of "whether identifiable applicants who were denied employment because of race after the effective date and in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e et seq., may be awarded seniority status retroactive to the dates of their employment applications." 424 U.S. at 750. After discussing the legislative history of section 703(h) of Title VII, all the Franks Court could say was that however that section affected the post-Act operation of a seniority system which perpetuates the effect

of discrimination that occurred before the effective date of the Act, it had no bearing on the limited question which the Court was addressing. 424 U.S. at 761.

This Court has held that the same layoffs complained of in the instant action violated Title VII insofar as they perpetuated pre-1972 discrimination by the NYCPD against female police officers. Acha v. Beame, supra.

> "If a female police officer can show that, except for her sex, she would have been hired early enough to accumulate sufficient seniority to withstand current layoffs, then her layoff violates section 703(a)(1) of Title VII, 42 U.S.C. § 2000e-2(a)(1), since it is based on sexual discrimination." Id. 531 F.2d at 654 (emphasis supplied).

In Acha, as here, the layoffs were made pursuant to § 80 of the New York Civil Service Law, a facially neutral, "last-hired, first-fired" seniority system. Defendants in Acha argued -- and Judge Duffy initially held -- that such a facially neutral seniority system was protected by the exception in § 703(h), which allows an employer to apply different terms, conditions, or privileges of employment pursuant to a bona fide merit system, and that granting relief to plaintiffs would constitute preferential treatment, in violation of § 703(j) of Title VII, 42 U.S.C. § 2000e-2(j).

In reversing Judge Duffy's decision, this Court held that the layoffs were not protected by the exception for bona fide seniority systems in § 703(h). This Court, presaging Franks, found that the layoffs violated Title VII and that relief did not constitute preferential treatment, but rather was a remedial device well within the broad power conferred on the district court. Id. at 656. This Court reasoned that until the past discrimination against the policewomen was remedied, the seniority system could not be considered bona fide.

> "Until the past discrimination against these particular plaintiffs is remedied by according them the seniority position to which they are entitled, the system cannot be considered 'bona fide' and in fact represents a continuation of past intentionally discriminatory practices, and thus falls outside the terms of section 703(h)." Id. at 655.

Defendants argue that Acha does not control the instant action because Acha was decided by this Court before the Supreme Court decided Franks. (Appellants' brief pp. 20-32) Defendants fail to mention, however, that after Franks was decided the defendants in Acha -- the same defendants as in this action - moved for rehearing in view of the decision in Franks. In their brief in support of reargument defendants raised precisely the same issues as they raise here: (1) that the decision of this Court in Acha is

inconsistent with Franks because it fails to distinguish between discrimination before the effective date of the Act and discrimination after the effective date (Appellees' Brief in Support of Petition for Rehearing, p. 10); and (2) that plaintiffs who claim to have been the victims of discrimination "as long as twelve years ago" but did nothing until they were laid off should not be given constructive seniority which would adversely affect the seniority position of the persons employed by the police force during that entire period (Appellees' Brief in Support of Petition for Rehearing, p. 11).

Defendants' petition for rehearing in Acha was denied by this Court on May 10, 1976. This Court has therefore been squarely presented by these same defendants with the issue of whether its decision in Acha is consistent with Franks. In its decision to deny reargument, this Court has implicitly ruled that Acha and Franks are not inconsistent.

In United States v. Bethlehem Steel Corp., 446 F.2d 652 (2d Cir. 1971), this Court held the facially neutral seniority and transfer provisions at a Bethlehem Steel plant violative of Title VII. In Bethlehem, the company had discriminated in the hiring and job assignment of blacks prior to the effective date of Title VII. As a result of a departmental

seniority system, the few blacks who were hired were locked into departments with the lowest paid and most unpleasant jobs. This Court held that defendants' seniority practices violated Title VII despite the fact that the underlying wrong -- the discriminatory hiring and placement -- took place before Title VII was passed and was therefore lawful at the time it occurred.*

Defendants in this action have argued that the decision of this Court in Monell v. Department of Social Services of the City of New York, 532 F.2d 259 (2d Cir. 1976), supports their assertion that Title VII is inapplicable to the instant action because the hiring practices complained of predate the effective date of Title VII. As the District Court holds, defendants' reliance on this case is misplaced. (Op., A345a)

In Monell, this Court was faced with the very narrow issue of whether Title VII could be applied retroactively to permit the recovery of back pay where there had been no discriminatory acts after the effective date of Title VII. Plaintiffs had alleged that the discriminatory

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* In a subsequent case, an attempt to limit the Bethlehem Steel holding with respect to seniority relief to cases where the discrimination was in job assignment rather than in hiring was rejected by this Court. Patterson v. Newspaper and Mail Deliverers' Union, 514 F.2d 767, 774 (2d Cir. 1975), cert. denied, 427 U.S. 9 (1975).

policies of two New York City agencies forced them to take maternity leaves prior to the time medically or physically required. The discriminatory acts complained of occurred in 1971. Those policies were changed subsequent to the filing of the lawsuit. This Court dismissed the Title VII claims, holding that the claim for prospective injunctive relief was moot and denied an award of back pay on the ground that the only acts which resulted in monetary loss predated the applicable date of Title VII.

Monell is clearly distinguishable from the instant case. There was no claim in Monell that the pre-1972 discriminatory acts were perpetuated by further discriminatory acts after Title VII became applicable. Here, the 1975 layoffs perpetuate defendants' past discriminatory practices. The perpetuation of past discrimination by current employment practices based on that discrimination violates Title VII regardless of whether the underlying past discriminatory acts occurred before or after the applicable date of Title VII. Acha v. Beame; United States v. Bethlehem Steel Corp.

Another recent district court case in this Circuit has held pre-Act discriminatory practices which had a continuing effect to violate Title VII. Melani v. Board of Higher Educ. of the City of New York, 12 EPD ¶11,068 (S.D.N.Y. 1976) (Gagliardi, J.). In Melani, members of the

professional staff of the City University of New York alleged sex discrimination in the employment practices of the Board of Higher Education. The court held that the discriminatory acts complained of -- salary scales, tenure, promotion, maternity leave and layoff -- were continuing violations which brought the pre-1972 discriminatory acts complained of within Title VII.

> "[I]f the plaintiffs allege that [defendants] engaged in activities prior to the effective date [of the 1972 Amendment] which has a continuing discriminatory effect past the effective date, those continuing effects constitute a violation of the Act and give rise to a cause of action. Essentially, it was the obligation of governmental employers after the effective date of the 1972 amendments to examine their past activities to ensure that any discriminatory effects of those activities did not continue in violation of the Act." Id. at 4962.

The two remaining cases cited by appellants in support of the argument that pre-Act practices are outside the scope of Title VII are Waters v. Wisconsin Steel Works of International Harvester Co., 502 F.2d 1309 (7th Cir. 1974), cert. denied, 425 U.S. 997 (1974), and United States v. Sheet Metal Workers Local 36, 280 F. Supp. 719 (E.D. Mo. 1969). Whatever Waters stood for initially has been vitiated, and distinguished from this case, by the subsequent decision of the Court of Appeals for the Seventh Circuit in Evans v. United Airlines, Inc., 534 F.2d 1247 (7th Cir. 1976) (on rehearing). The Evans Court noted that:

> "[i]n Waters, the employees do not seem to have established a causal linkage between their inferior seniority status, which resulted in their lay-offs, and specific prior acts of discrimination directed at them personally." 534 F.2d 1249 n.8.

The other case relied upon by appellants, U.S. v. Sheet Metal Workers, Local 36, was reversed on appeal in 1969. 416 F.2d 123, 131 (8th Cir. 1969).

Finally, there is no support for appellants' contention, at pp. 30-31 of their brief, that plaintiffs here are not entitled to relief under Title VII because the hiring discrimination was not "intentional." While the pre-Act discrimination in United States v. Local 189, United Papermakers and Paperworkers, 282 F. Supp. 39 (E.D. La. 1968), aff'd, 416 F.2d 980 (5th Cir. 1969), cert. denied, 397 U.S. 919 (1970), consisted of purposeful job segregation, a later Fifth Circuit case, Johnson v. Goodyear Tire & Rubber Co., 491 F.2d 1364 (1974), held that blacks discriminated against by the company's high school diploma requirements and tests (the same type of discrimination present here) prior to the effective date of Title VII were entitled to seniority relief. Accord, Griggs v. Duke Power Co., 420 F.2d 1225, 1230 (4th Cir. 1970), rev'd in part on other grounds, 401 U.S. 424 (1971) (blacks discriminated against before 1965 by company high school diploma requirement held entitled to seniority relief).

2. The Legislative History of the 1972 Amendments to Title VII Makes Clear That Those Amendments were Intended to Provide Relief from the Perpetuation of Pre-Act Discrimination

It is clear that Congress by the 1972 Amendments to Title VII intended to provide relief for the perpetuation of pre-Act discrimination. The Supreme Court in Franks noted this in citing the legislative history of the 1972 Amendments:

> "21. It is true that backpay is the only remedy specifically mentioned in § 706(g). But to draw from this fact and other sections of the statute, post, at , any implicit statement by Congress that seniority relief is a prohibited, or at least less available form of remedy is not warranted. Indeed, any such contention necessarily disregards the extensive legislative history underlying the 1972 Amendments to Title VII. The 1972 Amendments added the phrase speaking to 'other equitable relief' in § 706(g). The Senate Report manifested an explicit concern with the 'earnings gap' presently existing between black and white employees in American society. S. Rep. No. 415, 92d Cong., 1st Sess. 6 (1971). The Reports of both Houses of Congress indicated that 'rightful place' was the intended objective of Title VII and the relief accorded thereunder. Ibid., HR Rep. No. 238, 92d Cong., 1st Sess. 4 (1971). As indicated, infra, at and n.28, rightful place seniority, implicating an employee's future earnings, job security and advancement prospects, is absolutely essential to obtaining this congressionally mandated goal.
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> The legislative history underlying the 1972 Amendments completely answers the argument that Congress somehow intended seniority

relief to be less available in pursuit of this goal. In explaining the need for the 1972 Amendments, the Senate Report stated:

> 'Employment discrimination as viewed today is a . . . complex and pervasive phenomenon. Experts familiar with the subject now generally describe the problem in terms of "systems" and "effects" rather than simply intentional wrongs, and the literature on the subject is replete with discussions of, for example, the mechanics of seniority and lines of progression, perpetuation of the present effect of pre-act discriminatory practices through various institutional devices, and testing and validation requirement.' S. Rep., supra, at 5. See also HR Rep., supra, at 8.

In the context of this express reference to seniority, the Reports of both Houses cite with approval decisions of the lower federal courts which granted forms of retroactive 'rightful place' seniority relief. S. Rep., supra, at 5 n.1; H. Rep., supra, at 8 n.2. (The dissent, post, at n.18, would distinguish these lower federal court decisions as not involving instances of discriminatory hiring. Obviously, however, the concern of the entire thrust of the dissent -- the impact of rightful place seniority upon the expectations of other employees -- is in no way a function of the specific type of illegal discriminatory practice upon which the judgment of liability is predicated. Thereafter, in language that could hardly be more explicit, the Conference Report stated:

> 'In any area where the new law does not address itself, or in any areas where a specific contrary intention is not indicated, it was assumed that the present case law as developed by the courts would continue to govern the applicability and construction of Title VII.'

Section-By-Section Analysis of HR 1746, accompanying the Equal Opportunity Act of 1972 -- Conference Report, 118 Cong. Rec. 7166 (1972)." (emphasis supplied). Id., 424 U.S. at 764-65.

The cases relied on in the legislative history and cited in the House Report (H.R. Rep. No. 238, 92d Cong., 1st Sess. (1971)) [1972 U.S. Code & Admin. News at 2144] are Quarles v. Philip Morris, 279 F. Supp. 505 (E.D. Va. 1968); United States v. Local 189, United Papermakers, 282 F. Supp. 39 (E.D. La. 1958), 416 F.2d 980 (5th Cir. 1969); International Ass'n of Heat and Frost Insulators, etc. v. Vogler, 407 F.2d 1047 (5th Cir. 1969), and cases cited therein. These cases, also cited in Bethlehem Steel, supra, similarly hold that Title VII prohibits the perpetuation of past discriminatory acts and that § 703(h) cannot be read to limit that Act's remedial powers to freeze Minorities into a continuing pattern of discriminatory employment practices.

The legislative history of the passage of Title VII in 1964 cannot be read as applicable to the 1972 amendments to Title VII because the circumstances of discrimination in private employment prohibited in 1964 were significantly different from those involved in public employment prohibited in 1972. When Title VII was initially enacted in 1964, several legislators were concerned that the 1964 Act not disturb existing seniority systems because these systems, though discriminatory, were not illegal when they were established. Even if this may have been the case in private employment, it certainly was not the case in public

employment covered by the 1972 Act. Any racially discriminatory seniority system was illegal prior to 1972 under the Fourteenth Amendment and 42 U.S.C. §§ 1981* and 1983.

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* 42 U.S.C. § 1981 reads as follows: "All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other."

Section 1981, like Title VII, does not require a showing of discriminatory intent. Bridgeport Guardians v. Members of the Bridgeport Civil Service Commission, 482 F.2d 1333, 1334, 1336 (2d Cir. 1974); Long v. Ford Motor Co., 496 F.2d 500, 505-506 (6th Cir. 1974). As the Sixth Circuit held in Long, supra, a prima facie case under 42 U.S.C. § 1981 "can be shown by proof either that intentional racial prejudice enter into his treatment or that a practice . . . operates discriminatorily against minority employees."

Section 1981 is separate and distinct from 42 U.S.C. § 1983, the latter having been enacted pursuant to the Fourteenth Amendment, while § 1981 was enacted under the Thirteenth Amendment. Runyon v. McCrary, 427 U.S. 160 (1976); District of Columbia v. Carter, 409 U.S. 418 (1973); Jones v. Alfred H. Mayer Co., 392 U.S. 409 (1968). Unlike § 1983, § 1981 specifically outlaws discrimination in employment by reason of race and ethnicity.

The court in Washington v. Davis, 44 U.S.L.W. 4789 (1976), similarly distinguished between the equal protection argument which it dealt with in Part II of its decision and § 1981 which was the statutory claim discussed in Part III of the decision. By addresing the § 1981 claims raised in Washington in Part III the court implicitly recognized that those claims state a prima facie case by merely showing of discriminatory impact.

Moreover, under Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d et seq. a discriminatory seniority system was illegal as of 1964 for recipients of federal aid.*

3. A Showing of Intentional Discrimination is Not Necessary to a Finding that a Governmental Employer has Violated Title VII

The Supreme Court has stated in the clearest possible language that Title VII is directed to "the consequences of employment practices, not simply the motivation." Griggs v. Duke Power Co., 401 U.S. 424, 432 (1970).

> "[G]ood intent or absence of discriminatory intent does not redeem employment procedures or testing mechanisms that operate as 'built-in headwinds' for minority groups and are unrelated to measuring job capability." Id. at 432.

The Court has indicated in two recent cases, General Electric Co. v. Gilbert, ___ U.S. ___, 50 L. Ed. 2d 343, 354-355, 97 S. Ct. 401 (1976), and Washington v. Davis, 426 U.S. 229, 246-47 (1976), that Griggs still states the law applicable to Title VII cases.

Appellants devote a substantial portion of their

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* Plaintiffs raised the claim in the District Court that defendants' practices violated Title VI. Because the District Court determined that those practices violated Title VII it felt it did not have to decide whether those acts also constituted violations of Title VI. (Op. fn. 2, A369a).

brief to the argument that Title VII applies a different standard to governmental employers than to private employers, and that the employment practices of the former violate Title VII only when intent can be proved. (Appellants' Brief, pp. 32-36) The short answer to that argument is that the legislative history and language simply do not support it.

The statutory language of Title VII draws no distinction whatsoever between the employment practices prohibited on the part of private and public employers. Both the House and Senate Report, in explaining the application of Title VII to state and local governments, expressly noted the need to stop the use of "invalid selection techniques,"* i.e., tests and educational requirements that are not in fact job-related. This concern was also expressed by Congressman Perkins,* the House floor manager, and Senator Williams,** the Senate floor leader.

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* S. Rep. No. 92-415, 92nd Cong., 1st Sess., 10 (1971); H.R. Rep. No. 92-238, 92nd Cong., 1st Sess. 17 (1971).

** Legislative History of the Equal Employment Opportunity Act of 1972 (hereinafter cited as "Legislative History"), 196 (1972).

Title VII does not establish a new substantive standard different from the clear meaning of the Equal Protection Clause. The "effect" rule under Title VII, as elaborated by Griggs and its progeny, is a precise prohibition against a relatively narrow class of hiring and promotion standards -- particularly tests and educational, height and weight requirements -- which are not related to the particular job at issue. Allowing the defense of job-relatedness assures that Title VII will not deprive any employer, private or public, of a personnel device actually necessary to its operation. Congress only applied this standard to state and local governments after seven years of experience in the private sector had demonstrated that the effect rule was both necessary and workable.

4. Appellants Engaged in Discriminatory Hiring Practices Both Before and After the Effective Date of the 1972 Act

Appellants throughout their brief strive to create the impression that all of the hiring practices, the discriminatory effects of which were continued by the layoffs, took place prior to March 24, 1972, the effective date of the amendments which made Title VII applicable to local

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* Id., p. 1114.

governmental employers. In fact, however, though the plaintiffs took examinations prior to this date, most were hired after the job freeze was lifted in 1973. What Title VII forbids is not the administration of tests which are discriminatory in their impact on protected classes and are not job-related, but the use of such tests in making employment decisions.

> "However, where waiting lists for employment or training are, prior to the effective date of the title, maintained on a discriminatory basis, the use of such lists after the title takes effect may be held an unlawful subterfuge to accomplish discrimination." 110 Cong. Rec. 7213 (1964).

Franks at 759 n.15 (Emphasis added).* Most of plaintiffs' class were hired some time after the effective date and were discriminated against after that date since, had the eligible lists not been based on discriminatory procedures, they would at least have been among the more senior of the post-Act appointees. See Steinbock Aff. and Exhibit A thereto (A400a).

B. Plaintiffs Are Not Barred by the Statute of Limitations of Title VII

Title VII, 42 U.S.C. § 2000e-5(e), provides that a charge of unlawful discrimination must be filed with the

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* The EEOC Guidelines notes, in the Statement of Purpose, that the Guidelines were developed in response to the increased use of tests and doubtful testing practices which have discriminatory effects. § 1607.1 (Pl. Exh. 2).

Equal Employment Opportunity Commission ("EEOC") within 180 days of the alleged wrong. There is no dispute that plaintiffs timely filed with respect to the layoffs in June 1975. Defendants argue, however, that plaintiffs should have filed at the time they were hired. Defendants do not cite any authority for this position, but merely argue that all of the cases which support the timeliness of plaintiffs' EEOC charge are incorrect.

The case law and the legislative history of Title VII support the timeliness of plaintiffs' EEOC charges on two grounds: (1) the denial of seniority is a continuing violation; and (2) the layoff is the act that triggers the running of the statute of limitations.

As indicated above, the case law has consistently held that facially neutral seniority systems which perpetuate past acts of discrimination violate Title VII. Following this rationale, the courts have held that a seniority system which perpetuates past acts of discrimination is a continuing violation, and thus an EEOC charge filed during the time a person is employed is timely. Evans v. United Airlines, Inc., supra; Jamerson v. Trans World Airlines, 9 E.P.D. ¶ 10,144 (S.D.N.Y. 1975). The district court in Acha used this rationale* on remand in holding that the

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* This same reasoning was recognized by Congress. The Congressional section-by-section analysis of the 1972 Act

EEOC charges, filed at the time of layoff, were timely. See Cates v. Trans World Airlines, 12 E.P.D. ¶ 11,137 (S.D.N.Y. 1976), which holds that the statute of limitations commences to run from the date of layoff. Cf. Collins v. United Airlines, Inc., 514 F.2d 594 (9th Cir. 1975).

Plaintiffs' EEOC charges were timely filed. No case has held that plaintiffs have to file at the time of hiring in order to be within the statute of limitations. As Judge Brieant noted in Cates, supra, there are sound policy and legal reasons for holding that the date of layoff, rather than the date of hire, is the date from which the statute of limitations runs.

> "[c]laims that the grievance arises at the date of hire would create a truly burdensome

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stated in reference to the 180 day limitation as follows:

> "This subsection as amended [section 706(e)] provides that charges be filed within 180 days of the alleged unlawful employment practice. Court decisions under the present law [former section 706(d)] have shown an inclination to interpret this time limitation so as to give the aggrieved person the maximum benefit of the law; it is not intended that such court decisions should be in any way circumscribed by the time limitations in this subsection. Existing case law which has determined that certain types of violations are continuing in nature, thereby measuring the running of the required time period from the last occurrence of the discrimination and not from the first occurrence is continued, and other interpretations of the courts maximizing the coverage of the law are not affected." 118 Cong. Rec. 7167, 7565.

caseload for the EEOC by opening the floodgates to premature challenges to facially neutral date-of-hire seniority systems. In order to preserve his right to challenge such a system before the EEOC, and subsequently in a private suit in a federal district court, every employee would have to file his charge within 180 days after he was assigned his place on the seniority roster. Those who believe that their risk of being laid off is somewhat heightened by a low seniority status which in turn is somehow traceable to past discrimination, would be driven to deluge the EEOC with charges of a potential unlawful employment practice, at a time when there is no assurance that any actual layoff or other discrimination will ever occur. Nor would such a rule promote clarity in the proceedings before the Commission, since in framing his charges, the individual would not be able to describe precisely what the company had done to him. We cannot believe that Congress intended the EEOC, which is required by law to investigate the grievances brought before it, to follow the wasteful procedure of conducting frivolous investigations into premature charges of past discrimination, as to which loss or damage is merely potential." Cates, supra, at 5238-5239.

II

THE DISTRICT COURT'S FINDINGS THAT PLAINTIFFS HAD ESTABLISHED A PRIMA FACIE CASE OF DISCRIMINATION AND DEFENDANTS HAD NOT SUSTAINED THEIR BURDEN OF SHOWING JOB-RELATEDNESS WERE NOT CLEARLY ERRONEOUS

The District Court found that, with respect to both the entrance examinations and the height requirement, plaintiffs had made a prima facie showing of discrimination as required by Title VII, and defendants had not met their burden of showing job-relatedness. (Op. A346a-367a) Griggs v. Duke Power Co., supra; Albemarle Paper Company v. Moody, 422 U.S. 405 (1975). These findings were based on a careful review of the expert witness testimony and the documentary evidence and are not clearly erroneous. Fed.R.Civ.P. 52(a).

A. Plaintiffs Have Shown the Statistical Adverse Impact of the Challenged Examinations

At the hearing on May 24, 1976 the Court ruled that plaintiffs had sustained their burden of establishing that the examinations had an adverse statistical impact on Minorities. The Court's ruling was based on the comprehensive Rand study, the testimony of Dr. Bernard Cohen, author of the study and the weight given the testimony of Dr. Alan Gross, defendants' expert witness who criticized

the study. (Op., A348a-A351a)

The District Court found that "the results of the Rand study are reliable and by themselves are sufficient to establish a prima facie case." (Op., A351a)* Defendants challenge these findings by arguing that regardless of the discriminatory impact of examinations there is no prima facie discriminatory impact if the percentage of Minorities hired is equal to their percentage in the population.** Defendants rely on this Court's recent decision in Equal Employment Opportunity Commission v. Local 14 International Union of Operating Engineers, No. 76-6150 (2d Cir. (March 21, 1977). In Local 14, no entry level examination was involved. The trial court had made a determination of discriminatory impact based on the differences between the percentage of Minorities in the union as compared with their percentage in the general population. In reversing and

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* This Court reached the same conclusion in Guardians I:

> "The Report confirmed plaintiffs' contention that the entry level examinations had had a racially discriminatory impact." Guardians Association v. Civil Service Commission, 490 F.2d 400, 402 (2d Cir. 1973).

** Defendants cite a number of circuit court opinions in support of this proposition (Appellants' brief at 41-42). However, none of these cases even addresses this issue. Those cases hold only that statistical comparisons using population statistics are sufficient to demonstrate a prima facie case.

remanding, this Court held that the evidence of disparate racial impact had been rebutted by statistics which showed that the union had admitted new Minority members in proportion to their percentage in the work force.

Local 14 is, however, totally inapposite to the prima facie showing in this matter because Local 14 did not challenge specific practices such as the entry level examinations or height requirement at issue here. The question before the District Court here was the disparate impact of the entry examinations, not the disparity between the percentage of Minority members on the police force in contrast to their presence in the labor force. As stated by the Court in its opinion:

> "Plaintiffs seek to prove that minorities are grossly underrepresented in the NYCPD. Defendants contend that the statistics demonstrate otherwise. However, even if the result were overrepresentation of minorities, that would have little relevance to the Title VII issue presented here. All that is challenged in this case is the selection practice that occurs at the point that members of the applicant pool actually show up and take the entry level examinations. Even if, as defendants contend, the percentage of minority policemen is nearly equivalent to the percentage of minorities in the relevant applicant pool, the fact remains that utilization of the examinations challenged has had the effect of significantly decreasing what might otherwise be the number of minorities who would under NYCPD procedures be eligible for appointment. The key question that must be faced is given the number of whites, blacks and Hispanics

> who took the NYCPD entry level examinations, whether the number who passed or failed and the scores they achieved were to a legally significant degree determined by their race." Op., A349a.

Other courts facing this issue have held in the same way. Johnson v. Goodyear Tire & Rubber Co., 491 F.2d 1364, 1372 (5th Cir. 1974); Waters v. Furnes Construction Co., No. 75-1347, Slip Op. at 7-8 (7th Cir. March 8, 1977). The reasoning of these courts is persuasive because to hold otherwise would be to build in a negative quota for Minority hiring. Once an employer had hired Minorities in proportion to their percentage of the population, he would be free to discriminate against any future Minority applicants regardless of the number that apply or their qualifications.

Furthermore, the percentage of Minorities hired after 1972 is the result not of defendants' good faith, but of a remedial procedure that belatedly addresses the very discriminatory practices challenged herein. Those hired after 1972 were the candidates who comprised the lower half of the ranked eligibility lists created from the 1968-1970 examinations. Those on the top of the lists were hired before the job freeze in 1970 and those on the lower half of the lists, which included a high percentage of Minorities, were hired after the freeze in 1973 and 1974. Thus the statistics of post-1972 hiring, if anything, buttress

plaintiffs' claims of discrimination.

Finally, defendants' statistics of the Minority concentration in the labor force are erroneous. Their figures reduce the actual number of Minorities by relying on census data for persons with 12 years of schooling. The requirement for appointment to the police force is only a high school equivalency diploma, not 12 years of schooling. Using the appropriate census data, the correct percentage of Minorities in the labor force is 32.6%. See "Coverage of Population in the 1970 Census and Some Implications for Public Programs" (A165a-197a) Thus, even if these post-1972 hiring statistics were relevant, they would show a continuing pattern of discrimination.

B. The Examinations Have Not Been Shown to Be Job-Related

As stated above, the Court after a comprehensive review of the evidence and a weighing of the expert testimony held that defendants had not carried their burden of showing the examinations job-related. (Op. A351a-A365a) Defendants argue that this finding was clearly erroneous. Curiously, defendants make this argument without reference to Title VII standards, except in a passing reference to Vulcan Society

of the New York City Fire Dept. v. Civil Service Commission, 360 F. Supp. 1265 (S.D.N.Y. 1973), aff'd, 490 F.2d 387 (2d Cir. 1973), but rely instead on tests never admitted into evidence and a decision based on constitutional doctrine, Washington v. Davis, 426 U.S. 229 (1976). Defendants' argument is without merit.

1. The Examinations Do Not Have Content Validity

In determining that the challenged examinations lacked content validity, the District Court looked to Judge Weinfeld's description of content validity in Vulcan Society, supra:

> "An examination has content validity if the content of the examination matches the content of the job. For a test to be content valid, the aptitudes and skills required for successful examination performance must be those aptitudes and skills required for successful job performance. It is essential that the examination test these attributes both in proportion to their relative importance on the job and at the level of difficulty demanded by the job." 360 F. Supp. at 1274 (footnotes omitted).

Judge Carter found that the examinations did not meet this standard because no job analysis was ever done and the method of test preparation did not compensate for the lack of a job analysis. (Op. A353a) The testimony of defendants' witness Solomon Weiner, former director of examinations for the Department of Personnel, and Dr. Richard Barrett, a nationally recognized testing expert who

testified for plaintiffs, was evaluated by the Court. (Op. A353a-A358a) The Court ruled that defendants had not met the standard for content validity sufficient to satisfy their burden of showing job-relatedness. EEOC Guidelines, 29 C.F.R. § 1607.5(a); Vulcan Society, supra; Jones v. New York City Human Resources Administration, 391 F. Supp. 1064 (S.D.N.Y. 1975); Kirkland v. New York State Dep't of Correctional Services, 374 F. Supp. 1361, 1373 (S.D.N.Y. 1974), aff'd in pertinent part, 520 F.2d 420 (2d Cir. 1975). (Op., A352a-358a) Defendants' arguments have not demonstrated that these findings were clearly erroneous.

2. Defendants Failed to Demonstrate Criterion-Related Validity

The Court found, after a careful weighing of the evidence, that defendants had failed to establish criterion-related validity. (Op., A358a-A365a) As the District Court noted, criterion-related validity is demonstrated by a showing of correlation between test performance and job performance. (Op. A358a) This is the definition in the EEOC Guidelines and was used by all the experts who testified at the hearings. (Tr. Barrett, A60; Tr. Weiner 379; Tr. Hall 761) It is the same definition as was stated by this Court. Bridgeport Guardians, Inc. v. Members of the Bridgeport Civil Service Commission, 482 F.2d 1333, 1337 (2d Cir. 1973).

Defendants, however, claim that their examinations are job-related, not because they predict good performance on the job, but because they bear a correlation to the examinations at the Police Academy. Defendants rely on Washington v. Davis, supra, as indicating that "the job-relatedness requirement for Title VII may well be satisfied by proof that an examination predicts candidate trainability." (Appellants Brief at 50) On the contrary, the critical point in Washington v. Davis was that it was not a Title VII case. Id., 426 U.S. at 238 n.10. In holding, in Part III of the Washington decision, that the finding of job-relatedness of the Washington D.C. civil service examinations -- which were qualitatively different from those challenged here -- was not clearly erroneous, the Court relied not on Title VII standards as set forth in the EEOC Guidelines, but on Civil Service Department regulations which state that criterion-related validity may rely on training performance. Id. at 251-252, n.16. Here, the EEOC Guidelines* and Title VII case law is to the contrary.

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* EEOC Guidelines provide in pertinent part:

"(3) The work behaviors or other criteria of employee adequacy which the test is intended to predict or indemnify must be fully described; and, additionally, in the case of rating techniques, the appraisal form(s) and instructions to the rater(s) must be included as a part of the validation evidence. Such criteria may

As this Court noted in Vulcan where this same argument had been raised:

> "Performance on a written multiple-choice examination may well correlate quite highly with the ability to learn certain skills but not with the ability to perform them on the job.[11]
>
> 11. The danger of distortion in this regard is particularly acute, since performance in the probationary school is also evaluated by means of a written examination. Thus, there is a distinct possibility that a claim that the qualifying examination tests for ability to learn in the probationary school is in fact no more than a claim that performance on the written qualifying examination predicts with reasonable accuracy performance on the written probationary examination. Without evidence that the second examination is job-related, such a demonstration is barren indeed." Id. 490 F.2d at 396. (emphasis added)

Accord, Commonwealth of Pennsylvania v. O'Neill, 348 F. Supp. 1084, 1090 (E.D. Pa. 1972), aff'd in pertinent part, 473 F.2d 1029 (3rd Cir. 1973); United States v. Chicago, 385 F. Supp. 543, 555-56 (N.D. Ill. 1974); Officers for Justice v. Civil Serv. Comm'n, 371 F. Supp. 1328, 1337 (N.D. Cal. 1973); Smith v. East Cleveland, 363 F. Supp. 1331, 1148-49 (N.D. Ohio 1973) aff'd in part and rev'd

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include measures other than actual work proficiency, such as training time, supervisory ratings, regularity of attendance and tenure. Whatever criteria are used they must represent major or critical work behaviors as revealed by careful job analyses." 29 C.F.R. § 1607.5(b)(3)

in part on other grounds, 520 F.2d 492 (6th Cir. 1976); Harper v. Mayor and City Council, 359 F. Supp. 1187, 1202-03 (D. Md.), modified and aff'd, 486 F.2d 1134 (4th Cir. 1973).

This reasoning is particularly appropriate here because there was evidence that performance on police academy examinations was not predictive of a candidate's ability to perform on the job as a police officer. Former New York City Police Commissioner Patrick Murphy testified that there was a weak correlation between academy performance and job performance. Tr. Murphy (A125-A126) In fact, Commissioner Murphy testified that "[s]atisfactory performance at the Police Academy in the training activities and other activities which I must point out are dramatically different than field performance." (Tr. A140)

Moreover, as noted above, the Washington holding is not applicable because there the tests were general tests of literacy only designed to test for trainability. Id. at 235. Memorandum in Support of defendants Hampton, Spain and Andolek's motion for summary judgment, 426 U.S. Briefs 229, at 97 (1976). Here, the tests were designed to test for job performance, not success in training, as defendants' counsel expediently claimed after the Washington decision (Op. fn.31, A373a-A374a) Before the decision in Washington defendants had claimed that the examinations predicted job

performance. Defendants' expert who supervised the preparation of the examinations, Solomon Weiner, specifically stated on a number of occasions that their tests should appropriately have to be correlated with job performance. (Tr. Weiner 377-378) In fact, Mr. Weiner testified that he reviewed the examinations in Washington in 1970 and rejected their design as inadequate because of their failure to test for job performance skills. (Tr. 419)

The defendants' development of the criterion study comparing performance on the entry level examinations with performance on tests given at the police academy was not based on any analysis of the validity of that criterion, but rather was a last minute attempt to draw a parallel to the Washington decision. The person who prepared the study for defendants testified that he did not know why performance on police academy examinations was chosen as the criterion for correlation:

> "Q Do you know why the choice of criterion of success at the academy was chosen rather than performance on the job, Dr. Weichun?
>
> A These were the data that were given to me I don't know why they were chosen. I assume that the data was available for this type of analysis." Tr. 861-862.

The A.P.A. Standards, which are referred to as authoritative in the EEOC Guidelines, specifically reject such a procedure.

> "Second, the logic of criterion-related validity assumes that the criterion possesses validity.

> All too often tests are validated against any available criterion with no corresponding investigation of the criterion itself. The merit of a criterion-related validity study depends on the appropriateness and quality of the criterion measure chosen. . . . Criterion-related validity studies based on the 'criterion at hand' chosen more for availability than for a place in a carefully reasoned hypothesis, are to be deplored." APA Standards at 27 (Pl. Exh. 3). (emphasis added)

Most importantly, the approach taken by the Supreme Court in Washington makes little sense here. The Washington D.C. Civil Service examinations were only qualifying examinations which tested for minimal verbal and communicative skills. Here, however, defendants have used their examinations not to gauge a minimum level of literacy (or any other skill) but rather for competitive ranking only. Candidates are hired in rank order of their performance on defendants' examinations. The scores -- high or low -- in themselves mean nothing in terms of abilities, since there is no cut off for a passing score. The result of the rankings is the very gravamen of the complaint: plaintiffs and members of their class are ranked low and, therefore, are the last hired and first fired. See Vulcan Society, supra, 360 F. Supp. at 1276.

The absurdity of using defendants' tests as ranking procedures rather than minimal qualifying examinations is obvious from a review of the questions. (See examinations,

Defendants' Exhibits J-P). Answers to questions like the following would make the difference between a ranking of one candidate over another and, thus, their dates of hire.

44. The Statute of Liberty was given to the United States by:

(a) England (b) Spain (c) Puerto Rico

(d) France.

It was questions like # 44 which were found by the Vulcan Society court to be particularly unrelated to the similar job of fireman. Id. at 1276.

In sum, defendants' reliance on Washington is misplaced and does not assist in their demonstration that the court below was clearly erroneous in finding that defendants had failed to demonstrate job relatedness.

III

THE ORDER BELOW WAS PROPERLY WITHIN THE COURT'S DISCRETION

A. Victims of Employment Discrimination Are Entitled to Constructive Seniority

After extensive hearings, the court below determined that the most appropriate means of remedying past discrimination was to order the appointment of members of the plaintiff class according to established constructive seniority dates. The order preliminarily enjoins defendants from reappointing or laying off police officers except pursuant to a seniority list which accords constructive seniority to the plaintiff class members who have suffered actual discrimination because of defendants' entry level examinations and height requirement. Members of the plaintiff class who failed NYCPD examinations or were appointed after the median appointment date are given constructive seniority as of the median appointment date for the first police examination they took. Similarly, those disqualified by the height requirement are constructively given the date on which they would have been appointed but for the disqualification, or the median appointment date, whichever is earlier.

The order is clearly within the discretion of the

District Court. As this Court has stated in a similar appeal:

> "The framing of decrees should take place in the District rather than in Appellate Courts." International Salt Co. v. United States, 332 U.S. 392, 400, 68 S.Ct. 12, 17, 92 L.Ed. 20 (1947); Chance, supra, 458 F.2d at 1178. A case like this, involving interim relief expected to be required for less than a year and reflecting the wisdom of a widely experienced and highly respected judge, should be almost the last to attract appellate intervention." Vulcan Society of New York City Fire Department v. Civil Service Commission of the City of New York, 490 F.2d 387, 399 (2d Cir. 1973).

See similarly, Bridgeport Guardians, Inc. v. Members of the Bridgeport Civil Service Commission, 483 F.2d 1333 (2d Cir. 1972); Rios v. Enterprise Association Steam-Fitters Local 638 of U.A., 501 F.2d 622 (2d Cir. 1974).

This Court has twice affirmed relief of the type directed by the District Court. Acha v. Beame, supra, and Chance v. Board of Examiners (Chance IV), supra. "Rightful place" seniority relief was endorsed by the Supreme Court in Franks, supra. Such relief has been deemed necessary in order to make persons whole for injuries suffered as a result of unlawful employment discrimination. Franks, supra; Albermarle Paper Co. v. Moody, supra.

In Franks, the Court recognized the importance of seniority in determining an employee's economic security. The Court determined that relief should be sufficiently broad to accomplish the "make whole" objectives of Title VII.

> "Adequate relief may well be denied in the absence of a seniority remedy slotting the victim in that position in the seniority system that would have been his had he been hired at the time of his application. It can hardly be questioned that ordinarily such relief will be necessary to achieve the 'make-whole' purposes of the Act." (Emphasis added) Id. at 4360, 4361.

The Court instructed district courts to analyze employment discrimination cases with the presumption that seniority relief is appropriate.

> "[O]ur holding is that in exercising their equitable powers, district courts should take as their starting point the presumption in favor of rightful place seniority relief, and proceed with further legal analysis from that point; and that such relief may not be denied on the abstract basis of adverse impact upon interests of other employees but rather only on the basis of unusual adverse impact arising from facts and circumstances that would not be generally found in Title VII cases. To hold otherwise would be to shield 'inconsisten[t] and capri[cious]' denial of such relief from 'thorough appellate review.'" (Citation omitted.) Id. at 4365, n.41 (Emphasis added).

In Franks itself, the Court ordered that plaintiffs be accorded seniority retroactive to the date of their

application.*

In Acha v. Beame this Court remanded to the District Court (Duffy, J.) with directions to reorder the seniority lists to accord constructive seniority to those policewomen who, were it not for defendants' discrimination, would have been hired early enough and accumulated enough seniority to withstand the layoffs.

The Court in Acha relied on another recent Second Circuit opinion, Chance v. Board of Examiners, (Chance IV), supra. Plaintiffs in Chance challenged the examinations for supervisory positions in the New York City school system as discriminatory. After successfully obtaining relief, many Minorities were appointed to such positions. That relief was eviscerated, however, by the layoffs ("excessing") of personnel. Although this Court reversed an order requiring that personnel be excessed in proportion to the racial and ethnic make-up of the persons holding supervisory positions, it did recomend a settlement which would "accord constructive seniority to any Minority supervisor who failed an examination since invalidated as discriminatory by giving

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* The seniority relief was ordered by the Supreme Court in addition to the relief previously ordered by the Court of Appeals, to wit, that those who had not been hired due to defendants' discriminatory practices be hired and awarded back pay.

him a date of appointment which is the mean appointment date of those who passed the examination". Id. at 999. See also United States v. Bethlehem Steel Corp., supra, where this Court awarded constructive seniority where a transfer and seniority system perpetuated pre-Title VII discrimination.

The constructive seniority relief granted by the District Court in the instant action was well within the Court's authority, and the manner in which that authority was exercised here was plainly within the court's broad discretion on issues of remedy. Indeed, the denial of constructive seniority relief under the circumstances of this case might well have been an abuse of discretion under Franks, supra.

B. The Court Properly Issued the Order After Allowing Both Parties to Present Proposals for Relief and After Holding a Full Evidentiary Hearing on Relief

Defendants' attack on the relief below relies in part on Equal Employment Opportunity Commission v. Local 14, International Union of Operating Engineers, ("Local 14") supra. That decision is, however, totally inapposite. There, the district court had ordered broad, sweeping reforms in an industry by an order which contained 61 decretal paragraphs and was issued without any hearing. Here, the Court issued a preliminary injunction because of

imminent rehiring of police officers; its order addressed only that issue and not the full scope of plaintiffs' rights to relief.*

Moreover, as is set forth in the Statement of Facts, supra, defendants in this action were given repeated opportunities to present alternative forms of relief as well as an opportunity to present testimony on the impact of plaintiffs' proposed relief. (Tr. SA295sa-SA296sa, SA339sa-SA340sa, SA343sa-SA346sa) Defendants never proposed any alternatives, but simply raised administrative questions about establishing constructive seniority dates in time for the March 31, 1977 rehiring. (Tr. SA301sa, SA400sa, SA469sa, ...e evidentiary hearing under the circumstances of an imminent rehiring was consistent with the requirements of Local 14, and the balancing of the equities was an appropriate exercise of judicial discretion. (Tr. SA313sa, SA314sa, SA326sa, SA451sa-SA553sa, SA431sa, SA457sa-SA459sa)

Finally, the stay issued by this Court has rendered moot any argument that the order requiring that the members of the plaintiff class be rehired was an abuse of discretion

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* The difficult questions of "front" and "back" pay, bumping, and future examinations were postponed by the Court for consideration at a later date. March 30, 1977 Order, ¶ 6 (A417a, 420a).

because of the administrative inconvenience it will cause. Defendants have now had an ample opportunity to process plaintiffs and members of their class for rehiring.

C. A Preliminary Injunction Was Properly Granted

The Court ordered that if defendants did not rehire members of the plaintiff class as ordered, the NYCPD was preliminarily enjoined from rehiring any police officers. March 30, 1977 Order (A417a, A419a). This injunction was properly granted because plaintiffs have shown probable success on the merits and the likelihood of irreparable injury should the injunction be denied. Fed. R. Civ. P. 65(a). Sonesta Int'l Hotels v. Wellington Associates, 483 F.2d 247, 250 (2d Cir. 1973); American Brands, Inc. v. Playgirl, Inc., 498 F.2d 947, 949 (2d Cir. 1974); Robert W. Stark, Jr. Inc. v. New York Stock Exchange; 466 F.2d 743, 744 (2d Cir. 1972).

The standard of review on an appeal from a preliminary injunction is "whether there has been an abuse of discretion or a clear mistake of law." 414 Theater Corp. v. Murphy, 499 F.2d 1155, 1159 (2d Cir. 1974); (granting of preliminary injunction affirmed); see also, Brown v. Chote, 411 U.S. 452, 457 (1973); Doran v. Salem Inn, Inc., 422 U.S. 922, 931-932 (1975). A recent and helpful restatement is

contained in Brown & Williamson Tobacco Corp. v. Engman, 527 F.2d 1115, 1121 (2d Cir. 1975), cert. denied sub nom. Brown & Williamson Tobacco Corp. v. Dixon, ___ U.S. ___, 48 L. Ed. 2d 837 (1976), affirming the denial of a temporary injunction.

> "Ultimately these motions are addressed to the discretion of the district court and its decision should not be disturbed unless an abuse of discretion is shown. In this regard, and particularly in this type of case, we must recall that courts of equity may go much further both to give or to withhold relief in furtherance of the public interest than where only private interests are involved. See Abbott Laboratories v. Gardner, 387 U.S. 136, 156, 87 S.Ct. 1507, 18 L.2d 681 (1967); Yakus v. United States, 321 U.S. 414, 441, 64 S.Ct. 660, 88 L.Ed. 834 (1944); Gulf & Western Industries, Inc. v. Great Atlantic & Pacific Tea Co., 476 F.2d 687, 699 (2d Cir. 1973)." (Emphasis added.)

The District Court did not abuse its discretion in granting relief. The order must therefore be affirmed.

CONCLUSION

For the reasons stated above, this Court should affirm the opinion and order of the District Court.

Dated: New York, New York
April 19, 1977

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